United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL CRANEYFIELD,

Plaintiff-Appellant

-against-

THE CITY OF NEW YORK and MATHEWS & CHASE

Defendants-Appellees

BRIEF SUBMITTED ON BEHALF
OF PLAINTIFF-APPELLANT

STATEMENT

The Plaintiff-Appellant appeals (1) to the United States Court of Appeals for the Second Circuit from the judgment dated February 26, 1975 and entered on February 27, 1975 dismissing the Complaint against the Defendants, MATHEWS & CHASE on their Motion for lack of jurisdiction and for a cause of action not stated on the ground that the same does not arise under the Federal Metal and Non-metallic Mine Safety Act; and the Plaintiff-Appellant appeals (2) from the said judgment dismissing the Complaint against the Defendant THE CITY OF NEW YORK, on the Court's own motion, for the said reasons aforesaid.

Amended Notice of Appeal of the Plaintiff-Appellant is also taken from the said judgments hereinbefore mentioned and from Memorandum Order dated March 21, 1975 and filed March 26, 1975 of Judge Richard Owen, denying the Motion for Reargument of the Motion to dismiss the Complaint.

The Plaintiff-Appellant, a locomotive engineer, operating a locomotive in a tunnel, sustained severe and permanent injuries when he was projected from the cab of the locomotive and under the wheels of the loaded car it was pulling, when 9 muck cars, loaded with rock

and which had become uncoupled, came rolling down an incline at great speed and struck with great force and violence the rear of the one car which remained attached to the locomotive, which had been brought to a stop.

The wheels of the loaded muck car rode over the left arm and humerus, causing the same to be almost severed and amputated. Although the team of surgeons sutured the arm and humerus back, their use have been greatly impaired and the Plaintiff-Appellant has suffered a severe and permanent injury which prevents him from ever operating a locomotive again.

The Plaintiff has premised his cause of action on the Federal Metal and Non-Metallic Mine Safety Act, 30 U.S.C., Section 731 et seq. to give the District Court jurisdiction. On the Motion for Reargument, the Plaintiff requested leave to serve an amended complaint based on the Federal Metal and Non-Metallic Mine Safety Act alone with the Federal Employers Liability Act, 45 U.S.C., Section 51, in the event the Court adhered to its original decision of dismissal on the ground that the Court did not have jurisdiction and on the further ground that the Federal Metal and Non-Metallic Mine Safety Act did not afford the Plaintiff an action for personal injuries under the provisions of said Act.

The Court on its decision on the Motion for Reargument adhered to its original decision in a simple one line decision of "Motion for Reargument is denied" without giving the Plaintiff the right to amend his complaint to bottom it on the Federal Employers Liability Act along with the Federal Metal and Non-Metallic Mine Safety Act. The Plaintiff contends that the action of the District Court is in error in its decision denying jurisdiction as well as in its failure to afford the Plaintiff the opportunity of amending his complaint so as to premise it on the Federal Employers Liability Act.

It is believed that the cause is the first action of its kind based on the Federal Metal and Non-Metallic Mine Safety Act and that by terms of said Act an injured workman working in the areas covered by said Act is entitled to bring an action for recovery of damages, either under the Federal Metal and Non-Metallic Mine Safety Act, along or in conjunction with other statutory or common law rights, either Federal or State. There is a savings clause in the Federal Act which retains for the plaintiff such rights that may be afforded him under other law. (Section 738(c))

POINT I

THE FEDERAL METAL AND NON-METALLIC MINE SAFETY ACT, 30 U.S.C., SECTION 721 GOVERNS THE OBLIGATIONS OF SAFETY OF THE DEFENDANTS TOWARD THE PLAINTIFF-APPELLANT IN UNDERGROUND MINE OR TUNNEL OPERATIONS, IRRESPECTIVE OF THE ULTIMATE USE OF SAID MINE OR TUNNEL

The District Court, upon the call of the calendar on the Motion to Dismiss, inquired rhetorically, "is this the case of a sewer being called a mine"? From that moment on, this case was lost. Nothing in the form of legislative history, abstracted and presented in the form of the deliberations of the Committees in the House and Senate, could sway the District Court that the objectives sought to be generated by the Congress in enacting the Federal Metal and Non-Metallic Mine Safety Act were safety and safety only. This is true whether the underground operations were to abstract gold, silver, copper, limestone, asbestos or sand and gravel. And, it is further true, whether the underground operatons in probing for silver, for example, finds no silver and the tunnel or mine is a dud.

Congress was not concerned in whether the underground operation resulted in abstracting

(a) precious metal such as gold, silver or copper, or

(b) minerals such as limestone, granite or asbestos, or

(c) sand and gravel, or

(d) abstracting a metal or non-metallic mineral other than coal or lignite, or

(e) in failure to extract any metal or non-metallic mineral, for which the original underground operations were intended.

Congress, on the other hand, was concerned with the safety of persons engaged in underground mining or tunnel operations, in their attempts to abstract a mineral, other than coal and lignite. The latter, coal and lignite underground operations were provided for by Congress in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801, et seq. The opening sentence in the latter Act (Section 801) reads as follows:

"Congress declares that -

(a) the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource - the miner."

Title 30, U.S.C. 801, replaced Title 30 U.S.C. 471, et seq. The United States Court of Appeals for the Third Circuit in the case of St. Marys Sewer Pipe Company v. Director of the United States Bureau of Mines, 262 Fed. 2d 378, held that the presence of methane gas, required the underground operations to be closed down and upheld the order of the Bureau of Mines.

Factually the Mine inspector found an impermissible amount of methane had seeped into the mine from an abandoned gas well and this finding was confirmed by the Federal Coal Mine Safety Board of Review (the Board) and ordered the mine closed pending correction.

The Third Circuit at Page 381 said:

> "This statute is remedial with a humane purpose in view and is therefore entitled to a liberal construction."

The appellant sought to confine the use of the word "methane" by Congress to methane gas generated from coal. The Third Circuit disagreed and stated Congress included methane gas emanating from abandoned gas wells (P.382).

Circuit Judge Staley, in his opinion reviews the arguments pro and con, referrable to the intent of Congress and then concludes

> "Contrawise, the intent of Congress appears clear beyond preadventure of a doubt. It was enacting safety legislation to prevent holocausts resulting from ignition of methane gas. The source of the gas did not appear to concern Congress except as it related to proposed testing procedures. Safety was the keynote of the legislation and the presence of methane in percentages in excess of the statutory minimum was to trigger the application of Section 209 relative to 'gassy mines' ".

The Court is invited to compare the allegations in the complaint (P. 15 a of Appendix) to Section 721 of the Act.

Actually, the complaint alleges the tunnel in question to be fashioned on the various definitions contained in Section 721 viz:

Commerce: Appendix Page 16 a Paragraph 6, 7, 8	The rock known as Manhattan Schist is extracted from the tunnel hundereds of feet underground, in the Borough of Manhattan and then transported to the State of New Jersey. This constitutes trade or traffic or commerce between 2 States .
Mine Appendix Page 17A Paragraph 10, 11, 12, 13, 16, 17, 18, 21, 22	a area of land from which minerals other than coal or lignite are extracted with workers underground, with underground passageways and workings, structures, facilities.
Operator Appendix 16a(Paragraph 5, 12, 29, 30.	The defendants are each included within the definition of Section 721 (c) of the Act.

Irrespective of what purpose the underground operations will be used for, at the moment of the accident, September 13, 1971, the underground operations of excavation included a tunnel blasted out of solid rock, with locomotives and muck cars on railroad tracks used to haul the mineral known as Manhattan Schist to the deep shaft at West 79th Street and Riverside Drive, from where it was hoisted by conventional mine hoists to the surface and transported by truck to New Jersey.

POINT II

THE SUMMONS AND COMPLAINT WERE DULY SERVED UPON THE DEFENDANTS MATHEWS & CHASE PERSONALLY AND INDIVIDUALLY BY THE U. S. MARSHAL

In their motion for dismissal, the defendants MATHEWS & CHASE state the service was improper because service was made on one, Sidney Prival, on September 10, 1974, at their Park Avenue office in New York City. Sidney Prival, according to the defendants was not a person empowered to receive process on behalf of MATHEWS & CHASE (Appendix P. 4a).

At Page 5 a of the Appendix the Defendant MATHEWS & CHASE by its Counsel, Marshall S. Endick, Esq., in Paragraph 3, concedes that a second purported service was made by delivery of a summons to Mr. A. A. Mathews, one of the partners. Although not suggesting or conceding that service on Sidney Prival was improper, inasmuch as he was the person in charge of its principal office, personal service on the partner, A. A. Mathews, cured any infirmity. Although Counsel for the Defendants, MATHEWS & CHASE, limits the motion to dismiss, to the service on Sidney Prival on September 10, 1974, it states the validity of the subsequent personal service on October 6, 1974 on the individual partner, A.A. Mathews will be challenged, if necessary, by a

subsequent motion. No subsequent motion was ever made.

The "Long Arm" statute of the State of New York is comparable to the rules of the Federal Court pertaining to service on a person outside of the State, who does business in the State. Personal service on the partners in California and Maryland gives this Court personal jurisdiction of the Defendants MATHEWS & CHASE.

In the case of Gardner v. United, 246 F. Supp. 1014, the Court held that where the third party defendant was doing business in New York and the cause of action arose out of such business, there was a basis for exercising in personam jurisdiction, despite the fact that he was a non-domiciliary and could be served outside the State under CPLR §313.

In the case at Bar, MATHEWS & CHASE, an international consulting firm of engineers, have their principal place of business at 230 Park Avenue, in the Borough of Manhattan, City of New York.

In the case at bar, the summons and complaint was served on the Defendant MATHEWS & CHASE by service on the general or managing agent, SIDNEY PRIVAL, at the Defendants' office located at 230 Park Avenue, New York City. Thereafter, service was affected on each of the partners, Messrs. Mathews and Chase, by service on them at California and Maryland, where they reside. Service in each case was effected by the

U.S. Marshal who made his return and filed the same with the Clerk of this Court. There can be no question referrable to doing business in the State for Mathews & Chase have been the consulting engineers on the huge construction job of the tunnel or mine beginning at West 50th Street for over two years or more. In their contract with the Defendant THE CITY OF NEW YORK, Mathews & Chase were under a duty to supervise the construction of the entire job, including the procurement of machines, tools, the use of dynamite in blasting the rock underground and the act of removing the rock known as Manhattan Schist to New Jersey.

Service was actually made on the two partners by the U. S. Marshal and hence, personal jurisdiction was obtained. Service on SIDNEY PRIVAL, as a managing or general agent of the partnership MATHEWS & CHASE, was sufficient to give personal jurisdiction to this Court under Rule 4(d)(3). Even if Sidney Prival is not a managing or general agent, the partnership of MATHEWS & CHASE had fair and adequate notice. See case of Lumbermens Mut. Casualty Co.v.Borden Co. 268 F. Supp 303. The nature of the income received by Mr. Prival shows that he is an executive in the almost $100,000 class. He claims to be employed by C.R.S. Design of New York, Inc. but neglects to inform this Court that

this organization is a division of A.A. Mathews. The latter is admittedly a partner of the firm of MATHEWS & CHASE. If he is that close to the partnership as to be an executive if a division of A.A. Mathews, then it can readily be claimed that service was made on a "representative so integrated with the organization that he will know what to do with the papers". See case of American Football League v. National Football League, 27 FRD 264, 269 (d.MD. 1961) quoted by counsel for the Defendant MATHEWS & CHASE in its Brief in the District Court.

Again, using the authority offered by the defendant's counsel, namely in Taylor v. Granite State Provident Association, 136 NY 343, "the managing agent must be some person invested by the corporation with general powers involving exercise of judgment and discretion, as distinguished from an ordinary agent or attorney, who acts in an inferior capacity and under the direction and control of supervising authority." A man in the pay bracket of Mr. Prival, earning as the record shows several thousands of dollars every two weeks, must be more than "an ordinary agent or attorney, who acts in an inferior capacity."

There is no requirement under the Federal Rule that the managing agent or general agent be an employee of the

corporation sought to be served. While the Defendant claims that Mr. Prival was not an employee of the partnership MATHEWS & CHASE, at the time of service, namely, September 10, 1974, it does not assert that he was not an employee say before July 1, 1974. Hence, if he was such an employee and was transferred to the payroll of C.S.R. Design of New York, Inc., Division of A. A. Mathews and was a managing or general agent prior to the transfer to the new corporation, something more than a change of payroll must be made by the principal to cancel out the agency of Mr. Prival. No notice is claimed to have been published or in any way communicated with persons dealing with MATHEWS & CHASE. However, the service on each of the partners as related heretofore, is sufficient to give this Court personal jurisdiction, inasmuch as such service has not been challenged.

POINT III

CONGRESSIONAL HISTORY OF THE FEDERAL METAL AND NON-METALLIC MINE SAFETY ACT, 30 U.S.C. 721 et seq. DEMONSTRATES A CLEAR INTENT TO REDUCE THE HIGH ACCIDENT RATE AND IMPROVE SAFETY CONDITIONS IN MINING OPERATIONS AND COULD BE PREMISED AS GIVING THE PLAINTIFF A CAUSE OF ACTION SEPARATELY OR WITH THE FEDERAL EMPLOYERS LIABILITY ACT, 45 U.S.C. 51, et seq.

In the Motion for reargument, leave was asked of the District Court to amend the complaint so as to base jurisdiction on the Federal Employers Liability Act, 45 U.S.C. Section 51 et seq., in the event the District Court adhered to its original decision of dismissal under the Federal Metal and Non-Metallic Mine Safety Act. Appendix, Page 75 a. Judge Owen, ignored this request entirely in denying the Motion for reargument, Appendix, Page 76a.

Judge Owen, in his brief conclusory decision, all the while, completely ignored the undisputed fact that at the time of the accident, the cargo freight contained in the train was in transit and moving in New York City on its intended New Jersey destination.

The cases in the Supreme Court set a precedent for Judge Owen to follow - going back to June 1, 1920, i.e. Philadelphia & Reading Railway Co. v. Hancock, 253 U.S. 284, 286, 40 S. Ct. 512, holding, among other things,

* * * that a trainman is employed in "interstate commerce" if any car contained interstate freight, where the ultimate destination was outside the State.

Justice McReynolds, writing for theCourt stated that "the determining circumstance is that the shipment was but a step in the transportation of the coal to the real and ultimate destination in another state."

(Coe v. Errol, 116 U.S. 517, 6 S.Ct. 475 and cases cited)

Following the Philadelphia Hancock case, supra, Judge Benjamin Cardozo then sitting in the New York Court of Appeals decided the Colt v. Erie RR Co. case, reported at 231 N.Y. 67, (1921) Cert. Denied, 257 U.S. 636, 42 S.Ct.49, wherein the case concerned carloads of beef in the course of transit from Buffalo to Montreal. When passing over a terminal road, the car became derailed and Plaintiff's intestate, a conductor in the service of one of the roads, was killed.

Judge Cardozo held that the movement in foreign commerce was single and continuous. At Page 71, the Court stated

> "Its character is determined by continuity of movement combined with unity of plan. Thus viewed, the switching at the terminal was not a finality, but an incident. The cause that Coe was serving when he died was the cause of

foreign commerce.
(Phila. & R. Ry Co. v. Hancock supra)

Further, at P. 73, Judge Cardozo says

"This is a case where the service was known from the beginning to be a step or link or incident in a movement that was to follow".

POINT IV

THE INTENT OF CONGRESS AS DISCLOSED BY SENATE REPORT NO. 1296 WAS TO INCLUDE EVERY MINE, THE PRODUCTS OF WHICH REGULARLY ENTER COMMERCE

The late Hon. Adam C. Powell as Chairman of the House Committee on Labor and Education and Senator Jacob Javits were among the principal proponents of the Bill that ultimately became the Federal Metal and Non-Metallic Mine Safety Act. The legislative history in Senate Report No. 1296 deals with the actions of these Congressional Committees covering theperiod from June 23 to August 31, 1966 and contained on Page 2851, the following language is used:

> "Scope of Coverage" and reads * * * "The proposed - Act - will cover every mine the products of which regularly enter commerce or the operation of which affect commerce * * * authorizing the Secretary (of Interior) to decline to assert jurisdiction under this Act over mines,when in his opinion, the effect of the operations of such mines in commerce is not sufficiently substantial to warrant the exercise of jurisdiction or the exercise of jurisdiction would impair the effective overall realimtion of the objectives of the Act * * * ."

Up to the time of the accident, in the case at bar, the Secretary of the Interior has not declined jurisdiction and therefore Federal Interior Department jurisdiction existed.

The question presented is Was this tunnel operation - a "mine" within the scope of the Act?

The word "mine" is defined in Section 2(b) of the Act to mean - "an area of land from which minerals (minerals in the legislative history has shown to include sand, gravel, crushed stone, etc) extracted with workers underground; any private roads, "appurtenant to such areas"; excavators, underground passageways, workings, structures and equipment, whether on surface or below, used in extracting such minerals, etc."

The bill encompassed small mine operators including sand, gravel and crushed stone operations. Nowhere in the bill or intentions is there any idea conveyed that the tunnel - mine operation must run in two or more states or exist between states. Hence, by definition as contained in the Act, the tunnel operation, as embraced in the allgations of the Complaint, was indeed a "mine".

Further, Section 30 U.S.C. Section 738 (c) says:

> "Nothing in this chapter shall be construed or held to supersede or in any manner affect the Workmen's Compensation laws of any State or territory or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers and employees under State or territorial laws in respect of injuries, occupational or otherwise * * * arising out of, or in the course of employment."

Surely, the specific language of the statute affords the Plaintiff the basic private right to enforce liability arising from a breach of duty imposed by law, i.e. principles of common law, or statutory law such as the Federal Employers Liability Act, 45 U.S.C., Section 51, et seq.

The legislative history as reported in U. S. Code Congressional and Administrative News, Vol. 2, Page 2846 (89th Congress, Second Session 1966). The Committee of Labor and Public Welfare to which was referred Bill (H.R. 8989) to promote health and safety in the metal and non-metallic mineral industries, and for other purposes being considered the same, reported favorably thereon with an amendment in the nature of a substitute and recommends that the Bill, as amended, pass.

The purpose, according to the Committee, was to reduce the high accident rate and improve health and safety conditions in mining and milling operations carried on in the metallic and non-metallic mineral industries. It establishes a Federal program of systematic inspection (providing for a joint Federal and State program of inspection where a State has an approved plan) of such operations which affects commerce and requires the development, promulgation and enforcement of health

and safety standards.

Responsibility for carrying out the purposes of the Federal Metal and Non-Metallic Mine Safety Act is vested in the Bureau of Mines of the Department of the Interior which has the major responsibility for carrying out the Federal Coal Mine Safety Act.

The bill includes within its coverage all metal and non-metallic mining other than coal and lignite mining. Coverage, however, does not include petroleum or any mineral extracted in liquid form from the earth unless extracted by methods requiring the employment of workers underground.

Congressional Hearings were held as early as 1956 which was to consider health and safety problems in these industries. Public Law 87-300 was enacted in 1961 and authorized the Secretary of the Interior to conduct studies covering causes and prevention of injuries and health hazards and the adequacy of State mine safety laws.

The special Mine Safety Study Board appointed by the Secretary conducted studies which were transmitted by the Secretary with recommendations to the Congress on November 13, 1963.

The study of the Mine Study Safety Board clearly demonstrated the widespread existence of correctable hazards to life and health, a high casualty rate suffered by working miners from dangerous conditions beyond their own control and the ineffectiveness of State and local efforts to reduce mine health and safety hazards.

During 1962 there were 212 deaths and 9,972 non-fatal lost time injuries from accidents in metal and non-metallic mining and milling operations (including stone quarries and sand and gravel operations). The report further demonstrated that these hazards included a great variety of conditions such as unguarded machinery and chutes; lack of fire alarm systems or adequate firefighting equipment; improper handling and storage of explosives; absence of second escapeways to surface, lack of safety devices on locomotives and mucking machines and other equipment; damaged and deteriorated supporting timbers; inadequate ventilation equipment; excessive concentrations of dust; excessive levels of radio-activity in uranium mines; lack of air testing devices; lack of adequate communication systems between surface and underground; cave-in dangers from loose or inadequately supported ground.

In November 1963, the report of the Mine Safety Study Board showed that the number and severity of injuries experienced each year was alarming. The report stated that in the face of 10,000 lost time injuries and more than 200 deaths in a single year, it would be difficult to ignore the need for positive action.

At page 2851 under the heading of Scope of Coverage, the report stated:

> "The proposed Federal Metal and Non-Metallic Mine Safety Act will cover every mine the products of which regularly enter commerce or the operation of which affect commerce."

Section 3 was added to permit the Secretary to decline jurisdiction under the Act over mines, when, in his opinion, the effect of the operation of such mines in commerce is not sufficiently substantial to warrant the exercise of jurisdiction or the exercise of jurisdiction would impair the effective overall realization of the objectives of the Act. The Report went on to define the word "mine".

Further study of the Committee Report shows that it declined to exempt from the jurisdiction of the Act operations that included sand, gravel and crushed stone. The basis for the Committee in refusing to exempt this industry were the labor statistics tables (pages 211, 212

of Senate Hearing) on injury frequency and severity rate conclusively show that the sand and gravel industry is the most hazardous except for the underground coal and mineral mining industries. Further review of the Report at page 2853 indicated an intent by the Committee to have the Secretary establish appropriate standards with respect to major health hazards of silicosis and other respiratory diseases related to excessive concentrations of dust and of lung cancer.

Senator Javits at page 2871 of the Report offered a minority amendment to give the Secretary discretion in deciding whether or not to cover such enterprises as small sand and gravel pits and similar crushed stone operations, thereby enabling them to be excluded by Departmental regulations. However, the Bill, as passed, covered all mining operations which substantially affect interstate commerce.

Senator Javits at page 2871 said that

> "Unlike the Coal Mine Safety Act, this bill will cover a great diversity of mines, with an even greater diversity of dangers and I believe it unwise to attempt to write a comprehensive 'laundry list' and risk leaving out some important danger, which through inadvertence, might have been overlooked by the committee."

Senator Fannin opposed the inclusion of the sand and gravel industry within the coverage of the Federal Metal and Non-Metallic Mine Safety Act. He based this opposition on the ground that blasting, tunneling and mine shafts do not exist in the sand and gravel industry. Nevertheless the Committee approved the inclusion in the coverage of the Act of the sand and gravel industry. The significance of Senator Fannin's basis for exclusion is important to the case at bar. Blasting, tunneling and mine shafts, if they are the criteria of a "mine" then the tunnel operations in question in the case at bar, is indeed a "mine" for the abstraction of the mineral (Manhattan Schist) is accomplished by the means of blasting, tunneling and mine shafts.

POINT V

MATHEWS AND CHASE ARE SUBJECT TO THE FEDERAL METAL AND NON-METALLIC MINE SAFETY ACT

The Defendant MATHEWS & CHASE, directly or indirectly were engaged in the operations and movement of mine-excavated crushed rock from New York to New Jersey for however short a period to the time of the accident suffered by the Plaintiff. The Defendants MATHEWS & CHASE, as an international firm of supervising engineers had full overall duties and responsibilities to act for and on behalf of the owner, the defendant THE CITY OF NEW YORK.

MATHEWS & CHASE acted with the same responsibilities as an architect, who is traditionally and conventionally the "boss" on the job for the owner. It could approve purchases of material and equipment, it could lay out the work, the location and the course it would take. MATHEWS & CHASE could approve or recommend payments for work done and in every respect was the alter ego of the Defendant THE CITY OF NEW YORK. Hence, MATHEWS & CHASE was an operator or agent of an operator within the definitions embraced in the Act.

In the interest of justice, this issue should be resolved by a jury finding of fact rather than having it

summarily disposed of by motion.

POINT VI

THE DISTRICT COURT SHOULD HAVE PERMITTED THE PLAINTIFF TO AMEND HIS COMPLAINT TO INCLUDE VIOLATION OF THE FEDERAL EMPLOYERS LIABILITY ACT, 45 U.S.C., Section 51, et seq. ALONG WITH THE FEDERAL METAL AND NON-METALLIC MINE SAFETY ACT AS REQUESTED IN THE MOTION FOR RE-ARGUMENT

On the theory that the Federal Metal and Non-Metallic Mine Safety Act in Section 738 (c) does not supersede or in any manner affect the Workmen's Compensation Law of any State or the common law or statutory rights, duties and liabilities of employers and employees under state or territorial laws in respect of injuries, occupational or otherwise, arising out of or in the course of employment, the Court should, on the motion for reargument, granted the Plaintiff the right to re-plead under the Federal Employers Liability Act. Absent such authority from the Court, the statute of limitations could be set

up as a bar. Here Judge Owens erred, and for this reason, among others, the dismissal should be reversed and the Plaintiff allowed to re-plead and to include the Federal Employers Liability Act as the basis of jurisdiction and/or liability, along with the Federal Metal and Non-Metallic Mine Safety Act. Any order of dismissal per Rule 12(b) should contain leave to amend. It has been held that participation in interstate shipment conveys coverage under the Federal Employers Liability Act, 45 U.S.C., Section 51, et seq., particularly the Safety Appliances Act. See Kach v. Monessen Southwestern, Ry. Co., 151 F2nd 400 (3 CA). The Third Circuit held this coverage extends even though the railroad itself does not transport freight across a state line. Here the railroad is a wholly owned subsidiary of the Pittsburgh Steel Co. and was 7-1/2 miles long and connects the various work of that company at Monessen, Pennsylvania, with lines of the Pittsburgh & Lake Erie Ry. Co. and the Pittsburgh & West Virginia Railway Co.

In the interest of justice the judgment of dismissal and the Order denying re-argument should be reversed to enable the Plaintiff to pursue his statutory and common law rights against those negligently responsible for his injuries and damages.

The 7-1/2 mile railroad does not publish tarrifs of any kind. does not issue bills of lading, its name does not appear on any bills of lading covering inbound shipment received from connecting railroads and does not participate in any of the freight rates covering materials transported by those railroads.

The defendant charges the Steel Company for its car spotting services and per hour hire for services of motor power and crew, locomotive cranes and crews and shovels.

Judge Maris held the railroad was engaged in interstate commerce at Page 401, the Court said

> "If it takes part with other carriers in the continuous movement of a consignment of freight which passes across a State line at some point in its journey between the place of origin and the place of destination it becomes a participant in interstate commerce and therefore, subject to the power of Congress under the commerce clause of the Constitution."

Judge Maris stated the 7-1/2 mile railroad's operation is largely confined to the movement of cars into and out of the Steel Company's works, it nonetheless does move for a partion of their trip carloads of freight which have been definitely committed to an interstate journey. (Page 402).

The proof further showed that the Interstate Commerce Commission declined to give the railroad a certificate of public convenience and necessity and held it to be a mere plant facility of the Steel Company. (Page 402).

Judge Maris said there is no room for doubt under the facts of this case. He stated that the Act of August 11, 1937 amended Section 1 of the Federal Employers Liability Act by adding thereto the following provision:

> "Any employee of a carrier, any part of whose duties as such employee should be the furtherance of interstate * * * commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of the Act * * * ." (Page 402)

The evidence clearly established that the Defendant habitually participated in the movement of interstate shipment of freight and that the Plaintiff customarily assisted as a locomotive fireman in those movements. The amended Act requires no greater showing than this. (Page 402).

In conclusion the Court Stated:

> "What we are to determine now is the meaning of a statute which assures a remedy for negligence to every employer of interstate or foreign commerce when injury is suffered in the promotion of interstate or foreign commerce." (P. 74).

CONCLUSION

WHEREFORE, it is respectfully prayed that the Judgment dated and entered February 26, 1975 and the Memorandum Order of Judge Owen dated March 21, 1975 and entered March 26, 1975 be in all respects reversed, and that the Plaintiff-Appellant have such other and further relief as may be just in the premises.

Respectfully submitted,

CORCORAN AND BRADY
Attorneys for
Plaintiff-Appellant
11 Park Place
New York, N. Y. 10007

375—Affidavit of Service

United States Court of Appeals
for the Second Circuit

The Lawyer's Printer Co., Inc., 11 Park Place, New York, N. Y. 10007

Samuel Chaneyfield
Plaintiff-Appellant

against

The City of New York and Matthews & Chase
Defendants-Appellees

On Appeal from Tye United States District Court
for the Southern District of New York

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York , ss:

Raymond J. Braddick, agent for Corcoran & Brady Esqs. being duly sworn, deposes and says that he is over the age of 21 years and resides at Levittown, New York

That on the 1st. day of May 19 75 at 22 East 49th. Street New York, New York he served the annexed Brief upon Kroll, Edelman, Elser & Wilson Esqs. in this action, by delivering to and leaving with said attorneys 2 true copys thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said action

Deponent is not a party to the action.

Sworn to before me, this 1st.
day of May 1975

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

Raymond J. Braddick

Copy Received
Date May 1 1975
J. Robert Morriland

Copy Received
Date